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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 AMANDA F.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

CASE NO. C19-6035-BAT

**ORDER AFFIRMING THE
COMMISSIONER AND DISMISSING
THE CASE**

13 Plaintiff Amanda F. seeks review of the Commissioner's determination that she is no
14 longer disabled, arguing that the ALJ failed to properly consider the opinion of a treating
15 physician. Dkt. 10. The Court **AFFIRMS** the Commissioner's final decision and **DISMISSES**
16 the case with prejudice.

17 **BACKGROUND**

18 In 2013, the Commissioner issued a decision finding plaintiff disabled beginning in
19 February 2007. Tr. 90-95. In November 2016, the state agency conducted a continuing disability
20 review and concluded that plaintiff had experienced medical improvement and was no longer
21 disabled as of November 14, 2016. Tr. 121, 146. Plaintiff sought review, and, after conducting a
22 hearing, the ALJ issued a decision on November 7, 2018, finding that plaintiff's disability ended
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on November 14, 2016, and that she had not become disabled again since that date. Tr. 10-20.

The Appeals Council denied plaintiff's request for review. Tr. 1.

The ALJ used the eight-step evaluation process for determining whether a person's disability has ended. *See* 20 C.F.R. § 404.1594. This process is similar to the five-step initial disability evaluation process, but in addition asks whether the claimant has experienced medical improvement and, if so, whether the medical improvement is related to the ability to work; if there is medical improvement related to the ability to work, the ALJ must reevaluate the claimant's residual functional capacity and determine whether the claimant can perform her past relevant work or, if not, whether she can perform other work. *Id.* The ALJ determined that plaintiff experienced medical improvement as of November 14, 2016; that the medical improvement was related to her ability to work because it increased her residual functional capacity; and that plaintiff was able to perform her past relevant work as an insurance clerk since November 14, 2016, and her disability therefore ended as of that date. Tr. 10-20.

DISCUSSION

Plaintiff argues that the ALJ erred in evaluating the opinion of her treating neurologist and sleep specialist, Kimberly Mebust, M.D. Dkt. 10 at 3. In general, the ALJ must give specific and legitimate reasons for rejecting a treating doctor's opinion that is contradicted by another doctor, and clear and convincing reasons for rejecting a treating doctor's uncontradicted opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996).

In February 2017, Dr. Mebust wrote that plaintiff had tried and failed a variety of antidepressant medications. She opined that plaintiff's depression was medically refractory and that it has caused her to have difficulties in performing activities of daily living including working in gainful employment. She further opined that plaintiff's negative symptoms of

1 depression were likely contributing to some degree to her hypersomnia and she had trouble at
2 times even getting out of bed due to depression. Dr. Mebust opined that on a more probable than
3 not basis, it was unlikely that plaintiff would improve and that plaintiff's depression is a lifelong
4 disability for her. Tr. 354.

5 In January 2018, Dr. Mebust opined that plaintiff's diagnoses, which included sleep
6 apnea resolved with tonsillectomy, periodic limb movement disorder, and possible neuropathy,
7 caused symptoms that included excessive daytime sleepiness, fatigue, obesity, and depression.
8 Tr. 474. Plaintiff had been evaluated and treated since 2005, but despite multiple medication
9 trials to treat the excessive sleepiness and depression, she continued to be symptomatic. Tr. 475.
10 Dr. Mebust opined that plaintiff was not a malingerer and her impairments were reasonably
11 consistent with the symptoms and limitations she described. Tr. 475. She opined that plaintiff
12 should avoid power machines, moving machinery or other hazardous conditions; she should limit
13 or avoid operation of motor vehicles when excessively sleepy; and she may need breaks at
14 unpredictable intervals during the workday due to sleepiness. Tr. 475-76. She opined that
15 plaintiff would have no exertional limitations but would have serious limitations in maintaining
16 attention for two-hour segments, performing at a consistent pace, and dealing with normal work
17 stresses, and she was likely to be absent from work as a result of her impairments more than four
18 times per month. Tr. 476-77. She opined that plaintiff's condition had been disabling since 2005.
19 Tr. 477.

20 The ALJ considered Dr. Mebust's February 2017 opinion when evaluating the severity of
21 plaintiff's impairments. Tr. 14. The ALJ gave the opinion little weight, noting that the issue of
22 disability is reserved to the Commissioner. *Id.* The ALJ also found that Dr. Mebust's opinion
23 was inconsistent with her own treatment notes, specifically her December 2016 note where Dr.

1 Mebust noted plaintiff's report that her medication provided adequate control of her symptoms
2 of depression, and her March 2018 note that plaintiff wanted to restart the medication she used
3 prior to her pregnancy, which the ALJ found to suggest that the medication had been effective.
4 Tr. 310, 361. In the same discussion, the ALJ gave little weight to Dr. Mebust's January 2018
5 opinion to the extent it pertained to her depression, for the same reason. Tr. 14. The ALJ found
6 that plaintiff had no severe mental impairments. Tr. 14.

7 The ALJ also considered Dr. Mebust's January 2018 opinion when evaluating plaintiff's
8 residual functional capacity. Tr. 18. The ALJ gave the opinion little weight, finding that it was
9 largely inconsistent with Dr. Mebust's own treatment notes, which included a diagnosis of only
10 mild obstructive sleep apnea and a notation that it was unclear whether it was symptomatic for
11 plaintiff or not. Tr. 18. The ALJ also found that the limitations assessed by Dr. Mebust were
12 largely inconsistent with plaintiff's statements to Dr. Rasumssen about her activities. Tr. 18.

13 As the Commissioner points out, plaintiff does not challenge the ALJ's assessment of Dr.
14 Mebust's February 2017 opinion in her opening brief. The Commissioner argues that plaintiff
15 has therefore waived any argument with respect to that opinion. Dkt. 11 at 10. Plaintiff asserts in
16 reply that the ALJ's rejection of the February 2017 opinion is relevant because the ALJ used his
17 rejection of the February 2017 opinion as a reason to reject the January 2018 opinion. Dkt. 12 at
18 1-2. However, the ALJ rejected the January 2018 opinion for the same reason as the February
19 2017 opinion to the extent it pertained to plaintiff's depression, as part of the ALJ's evaluation of
20 plaintiff's severe impairments. Tr. 14. Plaintiff did not challenge the ALJ's evaluation of her
21 depression or the finding that she had no severe mental impairments. Her arguments about Dr.
22 Mebust's January 2018 opinion focus solely on the doctor's opinions about plaintiff's sleep
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1 disorders. The Court finds that plaintiff has waived any arguments with respect to the ALJ's
2 assessment of Dr. Mebust's February 2017 opinion.

3 Plaintiff argues that the reasons the ALJ gave to reject Dr. Mebust's January 2018
4 opinion are both invalid. Dkt 10 at 4. First, she argues that the ALJ's finding that Dr. Mebust's
5 opinion was inconsistent with her treatment notes was invalid because the ALJ improperly
6 substituted his own interpretation of the notes for the doctor's. *Id.* The ALJ may not substitute
7 his own interpretation of the medical evidence for the opinion of a medical professional. *See*
8 *Tackett v. Apfel*, 180 F.3d 1094, 1102-03 (9th Cir. 1999). But the ALJ relied on Dr. Mebust's
9 own words from her treatment note in finding this inconsistency (e.g., Dr. Mebust's
10 characterization of plaintiff's sleep apnea as mild); he did not provide his own interpretation of
11 Dr. Mebust's notes.

12 Plaintiff also asserts that Dr. Mebust's treatment note refers to a polysomnogram test,
13 which was designed to evaluate sleep apnea, not hypersomnia, and that Dr. Mebust's opinion
14 was based on hypersomnia as her primary diagnosis. Dkt. 10 at 4. However, in the same note,
15 Dr. Mebust also discussed the results of a multiple sleep latency test conducted after the sleep
16 study, stating that it did not again demonstrate hypersomnia, although she noted that testing over
17 time for idiopathic hypersomnia can be problematic. Tr. 361. She assessed plaintiff with a "prior
18 diagnosis of idiopathic central nervous system hypersomnia but with normal current testing." *Id.*
19 Dr. Mebust thus considered and evaluated plaintiff's hypersomnia in addition to sleep apnea in
20 this treatment note. The ALJ could validly find Dr. Mebust's opinion of limitations due to
21 hypersomnia inconsistent with her assessment of hypersomnia in her treatment note.

22 Second, plaintiff argues that the ALJ's finding that the limitations assessed by Dr.
23 Mebust were inconsistent with plaintiff's statements to Dr. Rasmussen was not based on

1 substantial evidence. Dkt. 10 at 5-6. Plaintiff reported to Dr. Rasmussen, in an October 2016
2 psychological evaluation, that she spent the day caring for her three-year-old child and
3 completing daily chores including preparing meals, completing chores, shopping, and driving;
4 she did not report to Dr. Rasmussen that she needed help completing these tasks. Tr. 295. She
5 reported that she felt energized by Adderall and denied napping during the day. Tr. 294. Dr.
6 Rasmussen opined that plaintiff did not meet the criteria for a psychological diagnosis. Tr. 296.

7 Plaintiff argues that the ALJ's interpretation of her reports to Dr. Rasmussen is
8 inaccurate, asserting that Dr. Rasmussen noted that plaintiff slept on average 20 hours per day
9 and the ALJ omitted this evidence. Dkt 10 at 6. The Commissioner points out that plaintiff
10 reported to Dr. Rasmussen that she sleeps for an average 8 hours a night and relies on Adderall
11 to wake her up in the morning, and that she can otherwise sleep for up to 20 hours per day. Tr.
12 294. Plaintiff concedes in reply that this interpretation is more accurate but argues that she
13 nevertheless reported that she felt tired all the time and Dr. Rasmussen concluded that she
14 suffered from fatigue. Dkt. 12 at 7. But the ALJ based his finding on the daily activities she
15 reported, not her report of symptoms to Dr. Rasmussen. Plaintiff has not shown that the ALJ
16 erred in finding that her reports of activities to Dr. Rasmussen were inconsistent with the
17 limitations assessed by Dr. Mebust.

18 Plaintiff also argues that the ALJ erred by omitting other evidence from his assessment of
19 her daily activities, specifically her hearing testimony. Dkt. 10 at 6. But the ALJ discounted
20 plaintiff's testimony as inconsistent with the objective and other medical evidence, and plaintiff
21 did not challenge that finding.¹ Moreover, plaintiff's argument merely presents an alternative,
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23 ¹ Plaintiff includes the standards of review that the ALJ must consider the record as a whole,
including the evidence that supports and detracts from his conclusion, and that the ALJ may
reject the claimant's testimony only by providing specific, clear and convincing reasons. Dkt. 10

1 more favorable interpretation of her testimony than the ALJ's. For example, she asserts that
2 based on the ages of her children at the time of the hearing, she had help from the older children
3 to care for the younger ones. Dkt. 10 at 6. But the ALJ was not required to make this inference.
4 Where the ALJ's interpretation of the evidence is reasonable, the Court may not disturb it.
5 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The ALJ did not err by failing to include
6 plaintiff's more favorable interpretation of her testimony in his assessment of Dr. Mebust's
7 opinion.

8 Finally, plaintiff argues that the ALJ improperly relied on minimal activities that do not
9 indicate the ability to perform full-time work. Dkt. 10 at 7. She asserts that the activities the ALJ
10 relied on, which she characterizes as the ability to do a few chores around the house in between
11 naps, do not contradict Dr. Mebust's opinion. *Id.* The ALJ did not find that the activities she
12 reported to Dr. Rasmussen were indicative of the ability to work full time, but that they were
13 inconsistent with the limitations Dr. Mebust opined. In addition, plaintiff denied napping during
14 the day to Dr. Rasmussen, an example of the inconsistency the ALJ found. Tr. 294. An ALJ may
15 give less weight to an opinion that is inconsistent with other evidence in the record. *Batson v.*
16 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). The ALJ validly relied on the
17 inconsistency between plaintiff's reports to Dr. Rasmussen and Dr. Mebust's opinion.

18 The ALJ provided valid reasons to reject Dr. Mebust's opinion. Because plaintiff has not
19 established error in the ALJ's assessment of the opinion, the Court affirms the ALJ's decision.

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22 at 7. But plaintiff did not assign error to the ALJ's evaluation of her testimony and did not
23 present specific arguments challenging the ALJ's reasons for discounting her testimony.
Therefore, the Court finds that plaintiff has waived any challenge to the ALJ's assessment of her
testimony.

1 **CONCLUSION**

2 For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is
3 **DISMISSED** with prejudice.

4 DATED this 10th day of April, 2020.

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7 BRIAN A. TSUCHIDA
8 Chief United States Magistrate Judge
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